

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
)

Implementation of the Local Competition)
Provisions in the Telecommunications Act)
of 1996)
)
)

CC Docket No. 96-98

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Federal Communications Commission
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REPLY TO OPPOSITIONS TO PETITIONS FOR RECONSIDERATION

Time Warner Communications, Inc. (TW Comm), by its attorneys, pursuant to Sections 1.429(g) and 1.4(h) of the Commission's Rules,¹ hereby replies to certain oppositions to TW Comm's petition for reconsideration in this proceeding.

INTRODUCTION

On September 30, 1996, TW Comm filed its petition for reconsideration. As indicated in its petition, TW Comm generally concurs with the rules promulgated by the Commission in the First Report and Order.² TW Comm's petition asks the Commission to reconsider one very important aspect of the First Report and Order -- the methodology to be used by state commissions for the establishment of wholesale rates to be charged by incumbent local exchange carriers (ILECs) to telecommunications carriers for services available for resale. As demonstrated in TW Comm's petition, the Commission has improperly converted the standard for establishment of wholesale rates from the statutory standard based upon "avoided costs"³

¹47 C.F.R. §§1.429(g), 1.4(h).

²Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (First Report and Order), FCC 96-325, released August 8, 1996 ("First Report and Order").

³47 U.S.C. §252(d)(3). That subsection states as follows:

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to a very different standard based on what the Commission describes as "reasonably avoidable costs."⁴ In fact, as explained by the Commission, the "reasonably avoidable cost" standard is premised upon a hypothetical set of circumstances that is unlikely ever to exist, *i.e.*, that ILECs would entirely abandon provision of service at retail to end user customers and provide service exclusively through resellers.⁵ The economic impact of that conversion is to inflate the wholesale discount levels far above avoided costs, thereby artificially stimulating inefficient entry into the local services market through resale.

Several parties, including AT&T Corporation (AT&T), Worldcom, Inc. (Worldcom), and the Telecommunications Resellers Association (TRA), have opposed TW Comm's petition for reconsideration. Some of those oppositions misstate the applicable law, others question TW Comm's motives for seeking reconsideration. None of those opposing parties have provided any legal basis for denying reconsideration of the appropriate resale pricing standard.

Before addressing specific points raised by parties opposing TW Comm's petition for reconsideration, TW Comm deems it necessary to reiterate what its petition is about and what it is not about. TW Comm's petition for reconsideration asks the Commission to properly apply the statutory standard for establishment of wholesale rates as set forth in Section 252(d)(3) of

For the purposes of Section 251(c)(4), a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier. (emphasis added)

⁴First Report and Order, *supra* at ¶911.

⁵First Report and Order, *supra* at ¶911.

the Act. Contrary to certain allegations made in opposition pleadings, this dispute is not about favoring one form of telecommunications competition (facilities-based) over another form of competition (resale).⁶ It is not about "protecting [one's] turf."⁷ It is not about equalizing competitors' access to capital resources.⁸

TW Comm concurs with TRA and others that the 1996 Act contemplates multiple forms of local market entry, and that resale of ILEC services is an important means for local competitive entry. The resale provisions of the 1996 Act, if properly applied by the Commission and by state commissions, will achieve the Congressional objective of making available meaningful opportunities for resale without favoring or disfavoring any form of market entry and without asking some competitors to subsidize others. In asking for reconsideration, TW Comm seeks only that the statutory standard for establishing wholesale prices be correctly applied and that the Commission not adopt rules which result in wholesale pricing of ILEC services being misused for the purpose of handicapping local competition.

I. The Statutory Language is Unambiguous.
Thus, There is No Need to Look Beyond the Statute to Its
Legislative History to Interpret "Avoided Costs."
Moreover, the Legislative History is Fully Consistent with
the Plain Meaning of the Statute

Several parties, including Worldcom, assert that the Commission's interpretation of the words ". . . costs that will be avoided by the local exchange carrier" as encompassing

⁶TRA reply at 6.

⁷*Id.*

⁸*Id.*, at 7.

"reasonably avoidable costs," is necessary to achieve the statutory purpose of the 1996 Act.⁹ That argument fails for several reasons. First, there is nothing ambiguous about the language used by Congress in Section 252(d)(3) to describe the resale at wholesale rate standard. "Costs that will be avoided" is not a phrase that is reasonably susceptible to more than one interpretation. A standard dictionary definition of the word "avoid" is as follows: "1. to keep away from; shun. 2. to keep from happening."¹⁰ By definition, those costs that "will be avoided" by an ILEC when it sells its services to resellers are those costs which it will not happen to incur in that situation (selling to resellers). Any additional savings that an ILEC might realize if it were to totally abandon the retail market are not "avoided" costs within Section 252(d)(3).

It has long been held that where, as here, statutory language is clear, there is no reason to look beyond that language to expressions of legislative history, reports, etc. See American Civil Liberties Union v. FCC, 823 F.2d 1554 (D.C. Cir. 1987). In American Civil Liberties Union, the court expressly rejected Commission efforts to disregard clear statutory language in favor of contrary expressions of legislative intent. Those efforts were rejected by the court which stated as follows:

The Commission asks us to disregard clear statutory language and embrace contraindications found in a committee report, but which are not without ambiguity themselves. Even if the pertinent passage from the House Report is seen as speaking with complete clarity, the fact remains that committee reports, even authoritative

⁹Worldcom comments at 22-23.

¹⁰Webster's II New Riverside University Dictionary, Riverside Publishing Company, at 142.

committee reports, are not law [cites omitted] . . . We will not permit a committee report to trump clear and unambiguous statutory language.¹¹

As explained by TW Comm in its petition for reconsideration, the statutory requirement that wholesale rates be based on retail rates less only those costs which will be avoided is unambiguous. Thus, there is no need to look to other sources to interpret that requirement. Moreover, the legislative history of Section 252(d)(3) is fully consistent with the statutory language itself. As stated in the Conference Report accompanying the 1996 Act:

The wholesale rate for resold services under new section 251(c)(4) is to be determined by the State commission on the basis of the retail rate charged to subscribers of such telecommunications services, excluding costs that will be avoided by the incumbent carrier.¹²

Conspicuously absent from the legislative history is any language supporting the strained interpretations of the avoided cost standard that proponents of the Commission's reasonably avoidable test would attribute to Congress. Nothing in the legislative history indicates that wholesale discounts should be inflated beyond costs actually to be avoided by ILECs in order to stimulate resale competition. Nothing in the legislative history indicates that prices for resold services are to be based upon a "fiction" of total ILEC exit from the retail services marketplace - a most improbable scenario. Indeed, if the purpose for the wholesale rate based on avoided cost standard is to provide an opportunity for competition to ILEC services through resale, it

¹¹823 F.2d at 1569. See also West Virginia University Hospitals, Inc. v. Casey, 111 S. Ct. 1138 (1991); Consumer Product Safety Commission v. GTE Sylvania, Inc., et al, 447 U.S. 102. (1980).

¹²H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. at 126 (1996) (emphasis added).

makes no sense to base the wholesale price of the resold ILEC services on an assumption that the ILEC no longer will be a competitor for providing services to retail customers.

II. Proper Application of the Avoided Cost Standard Does Not Preclude Use of Forward Looking Costs

Another criticism of TW Comm's petition for reconsideration is that literal application of the statutory "costs that will be avoided" standard would enable ILECs to forestall resale competition by refusing to shed retail costs when selling to resellers.¹³ That is incorrect. In asserting that the "avoided cost" standard should reflect only costs not incurred in selling to resellers, TW Comm neither stated nor implied that forward looking avoided cost studies could not be used. If it is demonstrated to a state commission that an ILEC will not have to incur certain specific costs in selling services to resellers, such avoided costs are properly excludable in calculating the wholesale rates for those services under Section 252(d)(3).

TW Comm's criticism of the Commission's interpretation of the avoided cost standard is not that forward looking cost studies should not be used, but rather that, under the Commission's methodology, the basis for excluding costs from wholesale rates has nothing to do with cost avoidance by ILECs in selling to wholesale customers. Rather, it is based upon abdication of the retail market by the ILEC.

Similarly, TRA objects to TW Comm's account-by-account critique of the Commission's identification of specific cost accounts from the Uniform System of Accounts (USOA)¹⁴ as

¹³Worldcom comments at 22.

¹⁴47 C.F.R. Part 32.

containing presumptively avoidable costs. TRA refers to this account-by-account analysis as a "meaningless exercise."¹⁵ First, the decision to base the rules for avoided cost studies on the "meaningless exercise" of identifying specific costs accounts from the USOA was not TW Comm's idea, it was the Commission's.¹⁶ Presumably, the Commission elected to utilize USOA accounts in identifying avoided costs based upon a belief that certain accounting categories could be shown to contain costs which are avoided when service is provided to wholesale customers rather than retail customers. TW Comm deemed it necessary to engage in this "meaningless exercise" because it believes that certain of the accounts noted by the Commission as being presumptively avoided by ILECs in providing wholesale services contain costs which are indeed incurred by ILECs in selling service in wholesale markets as well as retail markets. Given the fact that the statutory requirement is that wholesale rates be based on retail rates excluding only costs "that will be avoided," proper identification by state regulators of avoided costs is imperative in order to establish wholesale rates which comply with the standard codified at Section 252(d)(3). Whatever mechanisms are established by the Commission for conducting avoided cost studies, those studies must be done properly. Avoided cost studies based on USOA accounts which contain costs that are not avoided in selling in wholesale markets would not meet that standard.

AT&T asserts that wholesale rates which include portions of advertising and marketing

¹⁵TRA reply at 9.

¹⁶First Report and Order, *supra* at ¶¶917-920.

costs could "compel new entrants to underwrite the ILECs' retail marketing efforts."¹⁷ This is incorrect. TW Comm's critique of the Commission's analysis of USOA accounts was based on a very simple proposition -- a proposition which either is lost on AT&T or which is intentionally being ignored by AT&T: certain portions of the costs in those USOA accounts are, in fact, incurred by ILECs in their provision of wholesale service to resellers, and therefore, should be included in wholesale rates. Those costs are not entirely associated with retail sales. To suggest, as AT&T does, that inclusion of portions of cost accounts to wholesale operations in the rates for those wholesale services somehow constitutes subsidization of ILEC retail activities reflects a thorough disregard for the avoided cost standard codified at Section 252(d)(3).¹⁸

III. TW Does Not Object to Resellers (or Any Other
Local Service Competitors) Providing Their Own
Operator or Directory Assistance Services

AT&T and TRA incorrectly accuse TW Comm of requesting that resellers be prohibited from providing their own operator or directory assistance services.¹⁹ This is absolutely

¹⁷AT&T opposition at 27-28.

¹⁸Neither does AT&T's strained attempt to distinguish marketing and advertising costs incurred in the wholesale computer chip market from marketing and advertising costs incurred in the wholesale telecommunications services market (AT&T opposition at 28 n. 41) bear any relevance to the proper application of the Section 252(d)(3) avoided cost standard. Whether or not ILECs "directly compete" with resellers, they still market their services to resellers, and incur costs in serving resellers. Those costs are properly includable in wholesale rates under Section 252(d)(3). Contrary to AT&T's assertion, resellers are, indeed, distributors of their vendors' services.

¹⁹AT&T opposition at 26, TRA reply at 12-14.

incorrect. In its petition, TW Comm objected to the Commission's stated basis for identifying USOA accounts 6621 (Call Completion Services) and 6622 (Number Services) as being presumptively avoidable, *i.e.*, that resellers either will provide these services themselves or obtain them separately from ILECs or others.²⁰ TW Comm noted in its petition that where a competitor purchases some components of ILEC retail services but not others, it is not engaging in ILEC service resale; rather it is piecing together its own service using unbundled network elements of the ILEC. Provision of competing service through unbundled network elements is expressly contemplated by the 1996 Act. Indeed, ILECs have a statutory duty to provide to any telecommunications carrier for the provision of telecommunications service "nondiscriminatory access to network elements on an unbundled basis at any technically feasible point" ²¹

However, there is a difference between purchasing an ILEC service for resale at wholesale rates on the one hand, and providing a service through purchase of ILEC unbundled network elements on the other hand. To base avoided cost discounts on the premise that resellers would obtain certain elements of ILEC services separately, either from the ILEC as unbundled network elements, or from another source, ignores the distinction between purchasing a service at a wholesale rate for resale and purchasing network elements to create one's own service.²²

²⁰First Report and Order, *supra* at ¶917.

²¹47 U.S.C. §251(c)(3).

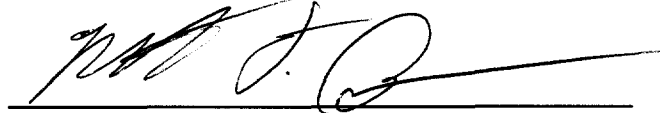
²²AT&T claims that customers view operator and directory assistance services separately from basic local dialtone (AT&T opposition at 26 n. 37). That may be so. However, Section 251((c)(4) does not provide for resale of basic local dialtone. Rather, it requires ILECs to offer

CONCLUSION

For all of the foregoing reasons as well as those articulated by TW Comm in its petition for reconsideration, TW Comm respectfully urges the Commission to modify its regulations for avoided cost studies as required by Section 252(d)(3) of the Act as set forth in its petition for reconsideration.

Respectfully submitted,

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for resale at wholesale rates "any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers" (emphasis added). Where ILEC retail services include on a bundled basis operator and directory assistance functions (*i.e.*, where those functions are included in the service rate and are not subject to separate charges), the service made available on a wholesale basis for resale must be the same service, including those features, as the service provided to retail customers. The purpose for the unbundled network requirement of Section 251(c)(3) is to enable competitors to utilize ILEC networks to compete without reselling ILEC "services."

CERTIFICATE OF SERVICE

I, Antoinette R. Mebane, hereby certify that on this 14th day of November, 1996 copies of the foregoing *Reply to Oppositions to Petitions for Reconsideration of Time Warner Communications Holdings, Inc.* CC Docket 96-98 were served to the parties listed on the attached service list.


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